Ohio, thereby becoming subject to taxation in Ohio. In this connection, the order made by the Tax Commissioner reads as follows (Record, p. 4):

> "It is the holding of the tax commissioner that the receivables as allocated to Ohio in the computation of credits did result from the sale of property from a stock of goods maintained within this state * * *.";

and the journal entry of the Board of Tax Appeals recites that (Record, p. 15):

> "For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state and, consequently, are taxable here."

Before the Board of Tax Appeals, appellant contended (1) that the fact that the avails of its receivables were applied indiscriminately to the general purposes of its business, in Ohio and elsewhere, and arose from sales of products manufactured in Ohio does not confer jurisdiction to tax the property upon the state of Ohio; and (2) that the statutes, as construed and applied to the agreed facts of this case, discriminate against appellant and in favor of domestic corporations similarly situated. Appellant pointed out that, as applied, the statutes subject its receivables to taxation in Ohio because they arose from the sale of property from a stock of goods maintained in Ohio, whereas, if appellant were a domestic corporation, the same receivables would be exempted from taxation in Ohio because they arose from sales made by an agent having an office in a state other than Ohio. Appellant maintained that the statutes are repugnant to the Fourteenth Amendment as so construed and applied, and pointed out that the vice inherent in this construction of the statutes is that it ignores the unequivocal requirement of Section 5328-1, General Code, that intangible

property of a non-resident must be used in business in Ohio as well as arise out of business in Ohio before it becomes subject to taxation in the state.

Appellant appealed from the decision of the Board of Tax Appeals to the Supreme Court of Ohio and in its notice of appeal assigned, among others, the following errors in the decision of the Board as grounds for reversal:

> "1. It affirms the action of appellee in assessing an ad valorem tax in respect of intangible property of appellant, a foreign corporation not having a commercial domicile in Ohio, notwithstanding that the property, consisting of accounts receivable and prepaid items, was never in Ohio and did not have a business situs in Ohio. The assessment, therefore, is invalid, and collection of the tax assessed would (a) burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.
>
> 2. It construes Sections 5328-1 and 5328-2 of the General Code of Ohio, as applied to the stipulated facts of this case, to require the assessment of appellant's aforesaid property for taxation in Ohio. As so construed and applied, said statutes are unconstitutional because (a) they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and (b) deprive appellant of its property without due process of law and deny appellant the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.
>
> 3. The intangible property of appellant is not taxable in Ohio under Ohio law, because it did not have a

business situs in Ohio and did not arise out of and was not used in business in this state.

4. There is no evidence in the record to support the Board of Tax Appeals' decision that appellant's accounts receivable resulted from sales of property from a stock of goods maintained in Ohio."

The Supreme Court affirmed the decision of the Board of Tax Appeals on August 4, 1948 and on October 6, 1948 denied appellant's application for rehearing which was filed on August 17, 1948.

### 5. Substantiality of the Questions Involved

A. The question raised by appellant's contention that the statutes in question violate the due process clause of the Fourteenth Amendment to the Constitution of the United States involves the jurisdiction of a state to tax the intangible property of a non-resident.

The Supreme Court of the United States has held that a state has the power to assess an *ad valorem* tax against credits belonging to a non-resident if the property acquires a business situs within the state (*New Orleans* v. *Stemple*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *State Assessors* v. *Comptoir National D'Escompte*, 181 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 221 U. S. 346), but whether or not business situs exists is a matter of proof of the integration of the intangibles with a local business conducted by their owner within the state. *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193; *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234. Referring to these cases, it is said in the case of *Newark Fire Insurance Co.* v. *Board of Tax Appeals*, 307 U. S. 313, in the opinion announced by Mr. Justice Reed and concurred in by the Chief Justice, Mr. Justice Butler and Mr. Justice Roberts, that (319, 320):

"Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than that of the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. * * *

* * * * * * *

"To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

Appellant earnestly contends that there is no evidence in the record in this case of a factual connection between the intangibles in question and the state of Ohio such as to confer jurisdiction upon the state to assess an ad valorem tax against the property under the theory of business situs or otherwise, and respectfully submits that it is within the province of the Supreme Court of the United States to inquire whether there is such evidence. In this regard it is stated in the opinion of the Court in the case of *Beidler* v. *South Carolina*, 282 U. S. 1, that (8):

"* * * a conclusion that debts have thus acquired a business situs must have evidence to support it, and it is our province to inquire whether there is such evidence when the inquiry is essential to the enforcement of a right suitably asserted under the Federal Constitution."

To the same effect is the statement made in the opinion announced by Mr. Justice Reed in the Newark Fire Insurance Co. Case (319), supra:

"In so far as the conclusion as to the existence of a business situs for the purpose of taxation, distinct from the domiciliary situs, is the basis for a claim of a Federal right, the duty of inquiring into the evidence which establishes such business situs rests upon this Court."

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The state of Ohio bases its claim of right to tax appellant's receivables solely upon the fact that they resulted from sales of products manufactured by appellant in its Ohio plants. This contention finds a ready answer in the opinion of the court in the case of *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, a case involving the question of a business situs for taxation of accounts receivable which were created, applied and extinguished under precisely the same circumstances as the receivables involved in the instant case, viz (212, 213):

> "The question here is not of the taxation of the plants in other states. The real estate, equipment and all tangible property there located is taxable by those States respectively. The accounts receivable with which we are now concerned are the proceeds of contracts of sale. While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken. The tax is not on the manufacturing or on the privilege of maintaining sales offices. The tax is not on the net profits of a unitary enterprise demanding a method, not intrinsically arbitrary, of making an apportionment among different jurisdictions with respect to the processes by which the profits are earned. * * * Such a tax on net gains is distinct from an ad valorem property tax on the various items of property owned by the Corporation and laid according to the location of the property within the respective tax jurisdictions. Here, the tax is a property tax on the accounts receivable, as separate items of property, and

STATUTES CITED

these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

"Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

In *Wheeling Steel Corp.* v. *Fox*, supra, the facts with regard to the management of appellant's business, the location of its factories and sales offices, and the creation, custody and place of payment of its accounts receivable were the same as the facts in the present case. However, there appellant had returned for taxation in West Virginia only that part of its accounts receivable which had resulted from sales to West Virginia residents of products manufactured in that state and had returned for taxation in Ohio the accounts resulting from sales to residents of Ohio of products manufactured in that state. All of the accounts were held to be taxable in West Virginia and, while the court did not pass upon Ohio's jurisdiction to tax a part of the receivables, the opinion is clearly to the effect that the fact that goods are manufactured in a particular state is not sufficient to confer jurisdiction upon that state to tax receivables resulting from sales of the goods.

It cannot be said that the state of Ohio conferred some benefit or protection upon appellant with respect of the intangibles in question for which it was entitled to make an exaction. Cf. *Utah* v. *Aldrich*, 316 U. S. 174. Appellant owned and operated manufacturing plants in Ohio and, because of the benefits, opportunities and protection afforded

SUPREME COURT OF OHIO

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**No. 31079**

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WHEELING STEEL CORPORATION,
*Appellant,*

*vs.*

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO,
*Appellee*

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## JURISDICTIONAL STATEMENT

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Appellant, Wheeling Steel Corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

### 1. Statutory Provision Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Title 28, United States Code, Section 1257 (Pub. L. No. 773, 80th Cong. 2d. Sess.), reading, to the extent relevant here, as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> 2. By appeal, where is drawn in question the validity of a statute of any state on the ground of its being re-

to it and its property by the state, appellant was subject to the franchise tax[3] imposed by the state of Ohio upon foreign corporations for the privilege of doing business, and its lands, plants, machinery, office equipment, inventories of materials and stocks of completed products situated in the state were subject to Ohio's property tax laws.[4] Appellant's notes and accounts receivable became effective by action taken at its Wheeling office and there the receivables were kept and the required payments were made (*Wheeling Steel Corp.* v. *Fox*, supra, 298 U. S. 193, 212). There were no conceivable benefits or protection conferred upon appellant with respect of this property by the state of Ohio. Under similar circumstances it was said in the opinion of the court in the case of *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, that:

> "(80) * * * the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition; we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."

It has been said that (*Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444) "a state is free to pursue its own fiscal poli-

[3] Sections 5495 and 5499, General Code.

[4] Section 5328, General Code.

pugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

## 2. State Statutes the Validity of Which Is Involved

The statutes of the state of Ohio, the validity of which has been sustained by a final judgment of the Supreme Court of Ohio, the highest court of said state, as not being violative of or repugnant to the Constitution of the United States are Sections 5328-1 and 5328-2 of the General Code of Ohio.[1] These statutes, as construed and applied by the Supreme Court of Ohio in this case, authorize and require the assessment for taxation in Ohio, as items of property, the accounts receivable of a non-resident of the state on the sole ground that the receivables can be traced back to the sale of goods manufactured in Ohio. The pertinent provisions thereof are the following:

"Section 5328-1: * * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, * * * shall be subject to taxation; and all such property of persons residing in this state used in, and arising out of business transacted outside of this state by, for or on behalf of such persons * * * shall not be subject to taxation * * *."

"Section 5328-2: Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

In the case of accounts receivable, when resulting from the sale of property sold by an agent having an

[1] There is no official edition of the General Code of Ohio. Sections 5328-1 and 5328-2, General Code, appear on pages 17, 18 and 19 of Page's Ohio General Code Annotated, Volume 4A and at page 9, Throckmorton's Ohio Code Annotated, Volume 1, Part Second, 1940 ed.

office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.

In the case of prepaid items, when the right acquired thereby relates exclusively to the business to be transacted in such other state, or to property used in such business.

* * * * * * *

The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property to a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. * * *"

The statute under which intangible property is taxed is Section 5638, General Code, which reads as follows:

"Section 5638: Annual taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the classified tax list in the offices of the county auditors and duplicates thereof in the offices of the county treasurers at the following rates, to wit:

Investments, five per centum of income yield or of income as provided by Section 5372-2 of the General Code; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar, * * *."

The word "credits", as used in the foregoing statute, is defined in Section 5327, General Code, as follows:

> "Section 5327: The term 'credits' as so used, means the excess of the sum of all current accounts receivable and prepaid items [used] in business when added together estimating every such account and item at its true value in money, over and above the sum of current accounts payable of the business, other than taxes and assessments. * * *"

### 3. Dates of Judgment and Appeal

The date of the judgment of the Supreme Court of Ohio which is sought to be reviewed is August 4, 1948. Appellant filed an application for rehearing on August 17, 1948, which was denied on October 6, 1948. The judgment became final on October 6, 1948. The time for taking the appeal began to run on the date of the denial of the application for a rehearing, to wit, on October 6, 1948. *Dept. of Banking* v. *Pink*, 317 U. S. 264, 266.

The date on which the application for appeal was presented is November 1, 1948.

Under the provisions of Title 28, United States Code, sections 2101 and 2104, appellant may bring its appeal within ninety days after the entry of the final judgment of the Supreme Court of Ohio.

### 4. Nature of the Case and Rulings Below

This case originated before the Tax Commissioner of Ohio, appellee, who assessed an ad valorem property tax against certain notes and accounts receivable and prepaid premiums on insurance policies owned by appellant, a Delaware corporation, having its commercial domicile in West Virginia (*Wheeling Steel Corp.* v. *Fox*, 289 U. S. 193), over and against appellant's objection that its property was not

within the territorial jurisdiction of the state of Ohio. The assessment was affirmed successively by the Board of Tax Appeals and the Supreme Court of Ohio. At every stage in the proceedings appellant drew in question the validity of the statutes under the authority of which the assessment was made, upon the ground of their being repugnant to the Constitution of the United States.

The facts of the case were stipulated by counsel for the parties. In essence, they are that at all times mentioned in the stipulation appellant was a Delaware corporation engaged in the business of manufacturing and selling steel and steel products. Its principal business office was located in Wheeling, West Virginia, where its officers had their offices and its stockholders' and directors' meetings were held. The books and general accounting records of the corporation were kept at the Wheeling office and all of its money, securities, notes and other valuable effects were in the custody of its treasurer whose office was there.

Appellant had eight manufacturing plants, four of them in West Virginia and four in Ohio, and maintained fourteen sales offices in thirteen states, one of the offices being located in Ohio.

Orders for appellant's products were taken at the sales offices subject to acceptance at the Wheeling office. Credit was extended to purchasers and the terms thereof fixed only at the Wheeling office where all notes and accounts receivable arising out of sales of appellant's products were payable. Records of the accounts and the notes themselves were kept at Wheeling and, when paid, the avails of the notes and accounts were under the control of the corporation's treasurer and were applied, indiscriminately, to the general purposes of the business, in Ohio and elsewhere. The sales offices had no powers or duties with respect of the custody or collection of the notes and accounts.

Appellant maintained balances in banks situated in the same localities as its plants and payroll checks were drawn at the various plants on these local bank accounts. All commercial and other accounts payable were paid by checks drawn and issued at the Wheeling office.

Blanket insurance policies covering the corporation's properties in West Virginia, Ohio and other states were negotiated, delivered, paid for and kept at the Wheeling office.

In addition to the foregoing stipulated facts, the record shows that in its personal property tax return for the year 1942, appellant listed the balances in Ohio banks which it used to meet the payrolls of its Ohio plants as its only intangible property subject to taxation in Ohio but appellee assessed for taxation in Ohio that part of appellant's notes and accounts receivable resulting from sales of products manufactured in the Ohio plants. It was stipulated that the greater part of these receivables, in dollar value, resulted from sales of products which were manufactured after the receipt of specific orders from the purchasers and had not been stocked at the Ohio plants to fill any orders that might be received; and that only the smaller part of the receivables had resulted from sales of products which had been manufactured prior to the receipt of orders and kept on hand at the Ohio plants to fill any orders which might be received. It was also stipulated that some of the orders from which the receivables in question eventuated were sent directly by the customers to the principal office of appellant at Wheeling and there accepted, while other orders were received at the various sales offices and forwarded to the Wheeling office for acceptance. Appellee also assessed for taxation in Ohio that part of appellant's prepaid insurance premiums which were prepaid with respect of insurance on the Ohio plants. It was stipulated that both the receivables and prepaid insurance premiums

had been assessed for taxation in West Virginia for the year 1942. Nevertheless, the Supreme Court of Ohio decided that the state of Ohio had jurisdiction to tax the receivables that could be traced to sales of products manufactured in Ohio and insurance premiums prepaid with respect to insurance on the Ohio plants.

The assessment was made under the purported authority of sections 5328-1 and 5328-2, General Code, and appellant contended orally before the Tax Commissioner that the intangibles in question did not have a business situs in Ohio, that the state of Ohio lacked jurisdiction to tax them, and that the statutes in question, if construed and applied so as to subject the property to taxation in Ohio, would violate the Fourteenth Amendment to the Constitution of the United States. To this objection appellee said in his final order (Record, p. 2) dated December 26, 1944, assessing the tax:

> "As to such contention the tax commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds, and further, it is the position of the tax commissioner that the assessment as herein ordered is in every respect proper in view of the decision of the Ohio Supreme Court in the case of *Ransom & Randolph* v. *Evatt*, 142 O. S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2 General Code."

Appellant appealed from the final order of the Tax Commissioner to the Board of Tax Appeals of Ohio and, by assignment of error, renewed its contention that the statutes in question, as construed and applied, violate the Fourteenth Amendment to the Constitution of the United States. The Board of Tax Appeals affirmed the Tax Commissioner and, as to the validity of the statutes and the basis of its decision, said in its journal entry (Record, p. 7) dated April 7, 1947:

> "In the above two cases [*Ransom & Randolph Co.* v. *Evatt*, 142 O. S. 398 and *Haverfield Co.* v. *Evatt*,

143 O. S. 58] no constitutional question was involved since the state would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes [Sections 5328-1 and 5328-2, General Code], therefore, the rule adopted by the Supreme Court must be applied to non-residents. It is claimed, however, that to apply this rule to non-residents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this board has no right to declare a statute unconstitutional. * * * As stated before, this board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court."

The construction of Sections 5328-1 and 5328-2, General Code, which is referred to by the Tax Commissioner and the Board of Tax Appeals as having been adopted by the Supreme Court of Ohio in the case of *Ransom & Randolph Co.* v. *Evatt*, 142 O. S. 398 is that the receivables of a domestic corporation are exempt from taxation in Ohio under the following conditions:

1. if they are used in business, and
2. if they either (a) arise from the sale of property sold by an agent having an office in a state other than Ohio; or

(b) arise from the sale of property from a stock of goods maintained in a state other than Ohio; or

(c) * * * (not applicable) * * *. (Section 5328-2, General Code).

This construction is set forth in the syllabus[2] in the *Ransom & Randolph Company* Case as follows:

"2. Section 5328-2, General Code, fixes the business situs of accounts receivable. When such receivables

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[2] The syllabus of a decision of the Supreme Court of Ohio is prepared by the Judge assigned to write the opinion, and in all cases re-

are used in business and result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, such receivables shall be considered, for the purpose of taxation, to have arisen out of business transacted in a state other than that in which the owner thereof resides. The provisions of such section are to be reciprocally applied to the end that all accounts receivable having a business situs in this state shall be taxed in Ohio and no such property belonging to a resident of this state and having a business situs outside of this state shall be taxed in Ohio":

In the opinion of the Court in the same case it is said that (p. 408):

> "The only statutory conditions for out-of-state situs of accounts receivable [of a resident of Ohio] are that they shall be used in business and shall result from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein [Section 5328-2, General Code]."

With respect of the requirement that accounts receivable be "used in business", Section 5325-1, General Code, provides that:

> "Sec. 5325-1: * * * Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. * * *"

Although Section 5328-1, General Code, provides (1) that accounts receivable of an Ohio resident shall not be subject to taxation in Ohio "when used in and arising out of

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ceives the assent of a majority of the Court. It is the rule, therefore, that the syllabus states the law with reference to the facts upon which it is predicated. *The Baltimore & Ohio Railway Co.* v. *Baillie, et al.*, 112 O. S. 567, 570.

cies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded and to benefits which it has conferred by the fact of being an orderly, civilized society", and that in determining the jurisdiction of a state to tax, "the simple but controlling question is whether the state has given anything for which it can ask return."

In the present case appellant contends that the state of Ohio has given appellant nothing with respect of the intangibles in question for which the state is entitled to ask a return and, therefore, lacks jurisdiction to tax the property.

B. The question raised by appellant's contention that the statutes in question violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States involves the right of a state to assess an ad valorem tax against property of a foreign corporation and to exempt identical property of a domestic corporation from taxation.

In the case of *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, the Supreme Court of the United States held that a foreign corporation, having secured the right to do business in a state by the payment of the charge exacted by the state from non-residents for that privilege, was entitled to stand equal and be classified with domestic corporations of the same kind. In this regard, it is said in the opinion of the Court that (510):

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the 14th Amendment, a line has to be drawn upon the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and

other taxpayers of the state. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the 14th Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind."

To the same effect is the following language appearing in the opinion of the Court in the case of *Hillsborough Township* v. *Cromwell*, 326 U. S. 620, at page 623:

> "The equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is to equal treatment."

Appellant contends that Sections 5328-1 and 5328-2, General Code, as applied in this case, select appellant for discriminatory treatment by subjecting its property to taxation and exempting from taxation identical property of domestic corporations of the same class as appellant, and that the decision of the Supreme Court of Ohio in favor of the validity of the statutes, as so applied, is contrary to applicable decisions of the Supreme Court of the United States. *Cf. Concordia Fire Insurance Co.* v. *Illinois*, 292 U. S. 535; *Southern Railway Co.* v. *Green*, 216 U. S. 400.

The tax involved in this case is a property tax. It is not a charge imposed upon foreign corporations for the privilege of doing business in Ohio. For that privilege, the state of Ohio assesses a franchise tax[5] against foreign corpo-

[5] Sections 5495 and 5499, General Code.

rations and appellant was subject to that tax. Appellant, therefore, is entitled to equality of treatment from the state of Ohio with domestic corporations of the same class.

Appellant's complaint in this regard is that under the statutes in question its notes and accounts receivable which resulted from the sale of products which it manufactured in Ohio and sold in West Virginia are taxable in Ohio, whereas the same receivables, if resulting from the sale of products manufactured in Ohio and sold in West Virginia by an Ohio corporation would be exempt from taxation in Ohio. Appellant contends that this is discriminatory treatment, prohibited by the Fourteenth Amendment.

In the case of *Ransom & Randolph Company* v. *Evatt*, 142 O. S. 398, the Supreme Court of Ohio decided that under Sections 5328-1 and 5328-2, General Code, the accounts receivable of an Ohio corporation are exempt from taxation in Ohio if they are used in business and result from the sale of property sold (a) by an agent having an office in a state other than Ohio, or (b) from a stock of goods maintained in a state other than Ohio. In the present case the Board of Tax Appeals decided that under the same statutes, accounts receivable of a foreign corporation are subject to taxation in Ohio if they are used in business and result from the sale of property sold (a) by an agent having an office in Ohio, or (b) from a stock of goods maintained in Ohio, and the Supreme Court of Ohio affirmed the decision of the Board.

So construed, the statutes in question discriminate against foreign corporations and in favor of domestic corporations. A domestic corporation may maintain a stock of goods in Ohio and sell the goods through an agent having an office in another state or it may maintain a stock of goods in another state and sell the goods through an agent having an office

in Ohio and in either case receivables arising from the sales are exempt from taxation in Ohio: but if a foreign corporation conducts its business in exactly the same manner as the Ohio corporation, maintaining a stock of goods in Ohio and selling the goods through an agent having an office in a state other than Ohio, or maintaining a stock of goods in a state other than Ohio and selling the goods through an agent having an office in Ohio, then, in either case, receivables arising from the sales are taxable in Ohio.

In the present case, the Board of Tax Appeals found that the receivables in question arose from sales from a stock of goods maintained in Ohio and under Sections 5328-1 and 5328-2, General Code, were subject to taxation in Ohio. The Supreme Court of Ohio affirmed the Board's decision. Appellant contended that there was no evidence in the record that the receivables in question resulted from sales from a stock of goods maintained in Ohio and pointed to the stipulation that products shipped from appellant's Ohio manufacturing plants to fill the orders from which the greater part of these receivables had resulted, were manufactured after the receipt of the orders and that only the lesser part of the receivables had resulted from the sale of products which had been manufactured prior to the receipt of orders and kept on hand at the Ohio plants to fill any orders that might be received. However, assuming that the receivables had resulted from sales from a stock of goods maintained in Ohio, the evidence is that they also resulted from sales made by an agent having an office in a state other than Ohio, and for that reason, if appellant had been a domestic corporation, the receivables would have been held to be exempt from taxation in Ohio.

Appellant submits that there is no basis for the distinction made between its property and the property of a domestic corporation similarly situated and that Sections

5328-1 and 5328-2, General Code, violate the equal protection cause of the Fourteenth Amendment.

C. The question raised by appellant's contention that Sections 5328-1 and 5328-2, General Code, violate the due process clause of Section 8, Article I of the Constitution of the United States involves the right of a state to tax receipts from activities in interstate commerce carried on beyond the borders of the state and, thereby, to subject the property to the risk of multiple taxation to which local commerce is not exposed.

Appellant contends that the decision of the Supreme Court of Ohio that Sections 5328-1 and 5328-2, General Code, as applied in this case, do not violate the commerce clause is in conflict with the decisions of the Supreme Court of the United States in the cases of *Gwin, White & Prince* v. *Henneford,* 305 U. S. 434, and *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307.

It was held in *Gwin, White & Prince* v. *Henneford, supra,* that a state tax which, though nominally local, discriminates against interstate commerce by imposing upon it the risk of a multiple burden to which local commerce is not exposed is precluded by the commerce clause. In *J. D. Adams Mfg. Co.* v. *Storen, supra,* a state tax on gross receipts from interstate commerce was held to be invalid because it constituted a direct burden on the commerce. In the opinion of the Court it is said that (p. 311):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce

is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

The tax involved in the present case, while purporting to be a property tax, is actually a tax on receipts from activities in interstate commerce carried on outside of Ohio. The state of Ohio does not claim, nor is there any evidence in the record, that the receivables in question were integrated with appellant's manufacturing operations or its sales office in Ohio, or that the state had conferred some benefit, privilege or protection upon appellant with respect of the receivables so as to confer jurisdiction upon the state to tax the receivables as property.

The most that can be said as to the factual connection between the state of Ohio and the receivables in question is that they can be traced to sales of products manufactured in Ohio. It is stipulated that the sales were made by taking orders from prospective purchasers at the various sales offices subject to acceptance at appellant's principal office in Wheeling, West Virginia, which alone had the power to extend credit to purchasers. Other orders were sent directly to the Wheeling office by customers and were accepted there. All evidences of the notes and accounts receivable resulting from the sales were kept and controlled at the Wheeling office where they were payable.

The right of the state of Ohio to tax all of the receivables that can be traced to sales of products manufactured in Ohio has been affirmed by the Supreme Court of Ohio and if Ohio can tax these receivables because of this remote connection with them, then each of the states in which appellant maintained a sales office would have an equal right to tax the receivables that could be traced to the orders taken within its borders. All of the receivables are subject

to taxation in Delaware, the state of domicile of appellant (*Curry* v. *McCanless*, 307 U. S. 357, 368), and taxes on them have been paid to the state of West Virginia, the commercial domicile of the corporation (*Wheeling Steel Corp.* v. *Fox*, *supra*).

Appellant contends, therefore, that, as construed, the statutes impose a tax on receipts derived from sales made outside of Ohio in interstate and that, if lawful, the tax can be duplicated by other states. Appellant contends, further, that interstate commerce would thus be subjected to a double tax burden to which intrastate commerce is not exposed.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 of Title 28 of the United States Code.

DARGUSCH, CAREN, GREEK AND KING,
CARLTON S. DARGUSCH,
JOHN CAREN,
*Attorneys for Appellant,*
*Wheeling Steel Corporation.*

## APPENDIX A

SUPREME COURT OF OHIO

NATIONAL DISTILLERS PRODUCTS CORP., *Appellant*,

*v.*

GLANDER, Tax Commr., *Appellee*.

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NATIONAL DISTILLERS PRODUCTS CORP., *Appellant*,

*v.*

EVATT, Tax Commr., *Appellee*,

---

WHEELING STEEL CORP., *Appellant*,

*v.*

GLANDER, Tax Commr., *Appellee*.

---

UNITED STATES GYPSUM CO., *Appellant*,

*v.*

EVATT, Tax Commr., *Appellee*. (Two Cases.)

*Taxation—Corporation franchise and intangible personal property—Foreign corporation maintained Ohio plants which completed orders sold—General books kept and orders accepted at principal office outside Ohio—Accounts receivable or avails thereof used in business generally—Prepaid insurance premiums on property located in Ohio—Sections 5325-1, 5328-1 and 5328-2, General Code.*

(Nos. 31037, 31038, 31079, 31080 and 31081—Decided August 4, 1948)

Appeals from the Board of Tax Appeals

Five cases are here involved.

Each appellant is a foreign corporation which operates at least one manufacturing plant in the state of Ohio. Of

the five appeals two have been perfected by the National Distillers Products Corporation, a Virginia corporation, one by the Wheeling Steel Corporation, a Delaware corporation, and two by the United States Gypsum Company, an Illinois corporation.

In each case the Tax Commissioner of Ohio made an additional assessment of either intangible personal property tax or corporation franchise tax.

In each instance the order was appealed to the Board of Tax Appeals and was affirmed.

The cases are in this court for review on the contention of the appellant corporations that the decisions of the Board of Tax Appeals are unreasonable and unlawful.

Opinion *Per Curiam*

*Mr. Isadore Topper*, for appellant National Distillers Products Corporation.

*Messrs. Dargusch, Caren, Greek & King*, for appellant Wheeling Steel Corporation.

*Messrs. Scott, MacLeish & Falk, Mr. Clarence D. Laylin, Mr. Charles M. Price, Mr. Clifford C. Pratt* and *Mr. Joseph A. Dubbs*, for appellant United States Gypsum Company.

*Mr. Hugh S. Jenkins*, attorney general, and *Mr. Daronne R. Tate* for appellee.

By the Court:

These cases were presented together for the reason that all five of them involve similar questions of situs under the provisions of Sections 5328-1 and 5328-2, General Code.

These and cognate provisions have been discussed and applied in many recent decisions by this court. Aluminum Co. of America *v.* Evatt, Tax Commr., 140 Ohio St., 385, 45 N.E. (2d) 118; Proctor & Gamble Co. *v.* Evatt, Tax Commr., 142 Ohio Stat. 369, 52 N.E. (2d) 517; Ransom & Randolph Co. *v.* Evatt, Tax Commr., 142 Ohio St. 398, 52 N.E. (2d), 738; Haverfield Co. *v.* Evatt, Tax Commr., 143 Ohio Stat. 58, 54 N.E. (2d) 149; C. F. Kettering, Inc., *v.* Evatt, Tax Commr., 144 Ohio St. 419, 59 N.E. (2d) 370; National Cash Register Co. *v.* Evatt, Tax Commr., 145 Ohio

St. 597, 62 N.E. (2d) 327; American Rolling Mill Co. *v.* Evatt, Tax Commr., 147 Ohio St. 207, 70 N.E. (2d) 631.

Section 5325-1, General Code, reads as follows:

"Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products or merchandise; but merchandise or agricultural products belonging to a non-resident of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only. Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Section 5328-1, General Code, reads in part as follows:

"* * * Property of the kinds and classes mentioned in Section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in Section 5414-8 of the General Code * * * shall be subject to taxation * * *."

Section 5328-2, General Code, contains the following provisions:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in

such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employee connected with, sent from, or reporting to any officer or at any office located in such other state. * * *

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a nonresident person such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

The facts relating to two of the companies here involved are not in dispute and are supplied by stipulations. The two concerning the National Distillers Products Corporation are ten and nine pages respectively in length and need not be quoted in full for the purposes of this discussion. As above indicated, this company is a Virginia corporation. Its shareholders' meetings are held in that state. Its principal business office is located in the city of New York where the meetings of its directors are held and where all its business activities are controlled. All its accounts payable are paid from funds on deposit there. It has distilling and refining plants in seven states, including a large plant at Carthage, Hamilton county, Ohio. It sells its products in every state where such products may be sold legally. Payroll checks for employees of these several plants and checks for federal excise taxes due from these plants are paid with funds on deposit in banks in those localities. The funds are obtained through checks drawn at the New York office on banks in that city. All accounts receivable are posted in the

books of the company in the New York office where the accounts are payable. All the receipts are deposited in New York banks. The accounts receivable, the allocation of which resulted in the additional assessments of intangible property tax and corporation franchise tax, arose from the sale of products manufactured by the company at its Carthage plant. The products were shipped from a stock of goods maintained by the company at that plant to points in Ohio and other states. All orders for the sale of these products were solicited by agents outside of Ohio. The orders were forwarded to New York and were subject to acceptance or rejection at the New York office. When orders were accepted, shipping instructions were forwarded to the Ohio plant from which the products were then shipped to the designated points in Ohio and elsewhere. The moneys received from the accounts receivable were used by the company in its business generally wherever needed. In filing its annual report and tax return the company allocated none of its accounts receivable to Ohio.

In its opinion the Board of Tax Appeals correctly summarized the matter as follows:

"The appellant, as a corporation organized and existing under the laws of the state of Virginia, is a legal resident of that state; and as to the appellant corporation the state of Ohio is 'a state other than that in which the owner thereof resides' and such other state within the provisions of Section 5328-2, General Code, fixing the situs of accounts receivable and of other intangible property for purposes of taxation. In this situation, and applying the statutory provisions here in question as the same have been construed by the Supreme Court of this state, it follows that since the accounts receivable of the appellant corporation involved in this case arose—as this board hereby finds—in the conduct of its business in the state of Ohio by the sale of its products from a stock of goods located in this state, and since, further, such accounts receivable or the avails thereof were used or were intended to be used by the appellant in its business, whether in this state or elsewhere, such accounts receivable have a business and taxable situs in the state of Ohio, as found and determined by the Tax Commissioner."

The company contends further that this interpretation of Section 5328-2, General Code, renders these provisions violative of the due-process and equal-protection clauses of the state and federal constitutions. However, this question was squarely and properly decided in the recent case of Parke, Davis & Co. v. City of Atlanta, 200 Ga. 296, 36 S.E. (2d) 773, 163 A.L.R. 976, in which the first and fourth paragraphs of the syllabus read as follows:

"1. Where a foreign corporation kept a stock of goods in a warehouse in the city of Atlanta, Georgia, orders were received and approved outside the state, which were filled by delivering goods from the warehouse to resident purchasers and to common carriers for delivery to nonresident purchasers, accounts receivable thereon arise out of business conducted in the city of Atlanta, and would have a taxable situs for ad valorem taxation by said municipality, notwithstanding that the orders taken by the nonresident owner for the merchandise sold in the municipality are passed upon as to the credit of customers, and the books of account are kept at a point without the city of Atlanta and the state of Georgia. * * *

* * * * * * * *

"4. Where a nonresident corporation became the owner of accounts receivable arising out of business conducted in a municipality in this state, such credits had a tax situs in the municipality where such business was conducted, so that the enforcement of a tax upon the credits would not be contrary to the guaranty of the due process or equal protection of the law as expressed in the Fourteenth Amendment to the Constitution of the United States, or paragraphs 2 and 3 of Section 1 in Article I of the Constitution of Georgia, notwithstanding that the credit of the customers may have been passed upon and the books of account kept by the corporation at a point without the state."

The facts concerning the Wheeling Steel Corporation are embodied likewise in a stipulation. As already stated, it is a Delaware corporation and maintains an office in that state. However, Wheeling, West Virginia, is the location of its

principal office and place of business where all meetings of the share holders, directors and executive committee are held. Its general books and accounting records are kept there. All credit is determined there; and the collections of notes and accounts receivable are made there. Four manufacturing plants are operated in West Virginia and four in Ohio. Sales offices are maintained in twelve states—one in Ohio. When notes and accounts receivable are paid, the avails thereof are applied indiscriminately to the general purposes of the company's business, whether in Ohio or elsewhere. Pay rolls are prepared and pay-roll checks are prepared, signed and distributed at each plant. Bank balances sufficient for this purpose are maintained in each such community.

In its opinion the Board of Tax Appeals said in part:

"It is clear that under this statute (Section 5328-1, General Code) intangibles owned by a nonresident cannot be taxed unless they are both used in business in this state and arise out of business transacted here. * * *

"Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this state and elsewhere, they must be held to be used in business within the meaning of this statute (Section 5325-1, General Code). * * *

"It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that none of its accounts receivable is taxable here. The board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of *National Distillers Products Corporation* v. *Glander*, No. 11118, decided by this board on March 12, 1947. In that case approximately 90%

of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

"For the foregoing reasons the board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this state and, consequently, are taxable here.

"No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on property located in this state. As to this, Section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The board finds that these prepaid items relate to property used in appellant's business in this state and, in view of the above statutory provisions, arose out of business transacted in this state and are, therefore, taxable."

The facts concerning the United States Gypsum Company are presented by a stipulation of facts and the testimony of two witnesses.

This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All pay-roll checks are prepared and signed there and are drawn on funds there and in Ohio.

Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere.

In its opinion the Board of Tax Appeals reached the following conclusion:

"The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the case of *National Distillers Products Corporation* v. *Glander*, No. 11118 decided by this board on March 12, 1947, and the case of *Wheeling Steel Corporation* v. *Glander*, No. 9681 decided by this board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of *National Distillers Products Corporation* v. *Glander*, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

"For the foregoing reasons the board finds that the ac-

counts receivable in question resulted from sales of property from a stock of goods maintained in Ohio."

The company insists that there is a total lack of integration of the accounts receivable with that part of the company's total business which is conducted in Ohio. This court finds that it cannot agree with this contention. In this and the other cases the decisions of the Board of Tax Appeals must be affirmed.

*Decisions affirmed.*

Weygandt, C. J., Turner, Matthias, Hart, Zimmerman, Sohngen and Stewart, JJ., concur.

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## APPENDIX B

BEFORE THE BOARD OF TAX APPEALS,
DEPARTMENT OF TAXATION OF OHIO

Apr. 7, 1947.

No. 9681

WHEELING STEEL CORPORATION, *Appellant*,

*v.*

C. EMORY GLANDER, Tax Commissioner of Ohio, *Appellee*

ENTRY

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an assessment made by him against the appellant on its taxable credits consisting of notes or accounts receivable and prepaid items, which assessment amounted to $6,280.35. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts and briefs of counsel.

From the stipulation of facts it appears that appellant is a Delaware corporation, in which state it maintained a statutory office. Its principal office and place of business

were located in Wheeling, West Virginia; where all the officers had their offices, where all meetings of shareholders, directors and the executive committee were held and where all dividends were declared. All of appellant's general books and accounting records were kept at the Wheeling office. All credit was granted and collections of accounts and notes receivable, etc. were made there. Appellant operated four manufacturing plants in West Virginia and four in Ohio. It maintained sales offices in twelve states, one of which offices was located in Cincinnati, Ohio.

The stipulation also contains the following:

"Sales of appellant's products that gave rise to all of the notes and accounts receivable belonging to appellant and its subsidiaries on tax listing day in 1942 resulted either (1) from orders received at the sales offices, enumerated in paragraph seven hereof, and accepted at the Wheeling office or (2) from orders received at the Wheeling office and there accepted. All orders received at the sales offices were subject to acceptance or rejection at the Wheeling office and, when so received, were forwarded by said sales offices to the Wheeling office for that purpose. Credit was extended to purchasers and the terms thereof fixed only by the Wheeling office. The selling prices of all of said products were fixed at the Wheeling office. * * * *

"All of the aforesaid notes were executed by the makers at their respective places of business and were payable at the Wheeling office to which they were forwarded by the makers upon execution and there kept until paid. Upon payment, the avails thereof were under the control of the Treasurer of appellant and were applied indiscriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. The sales offices had no powers or duties with respect to the creation, custody, collection or extinguishment of said notes.

"All of the aforesaid accounts receivable were due within one year and were billed from and were payable at the Wheeling office. The books containing the record of said accounts receivable were kept at the Wheeling office. When paid, the avails of said accounts receivable were under the control of the Treasurer of appellant and were applied in-

discriminately to the general purposes of appellant's business, whether in Ohio or elsewhere. No record of said accounts receivable were kept at the sales offices which had no powers or duties with respect to the collection thereof.

"All of said notes and accounts receivable arose in the ordinary course of appellant's business of making sales of its products.

"Payrolls were made up and payroll checks were prepared and signed at all of appellant's plants and distributed to employees at the respective plants. Balances were maintained in banks situated in the same localities as the plants sufficient for this purpose. All commercial and other accounts payable were paid by checks signed at and issued at the Wheeling office.

"All policies of insurance against loss or liability purchased by appellant were negotiated at the Wheeling office, where they were delivered, paid for and kept. Such policies were blanket policies covering properties and potential risks in West Virginia, Ohio and other states.

"All of said notes, accounts receivable and prepaid insurance premiums were subjected to ad valorem property taxes by the state of West Virginia in 1942 and said taxes were paid by appellant to the state of West Virginia for 1942."

In its consolidated inter-county return appellant allocated all of its accounts receivable and prepaid items outside of Ohio. The tax commissioner, on the other hand, determined that certain of the credits owned by appellant and its subsidiaries had their situs in Ohio and that the amount thereof which was, therefore, taxable in this State was $2,093,450, making an assessment thereon of $6,280.35, which is the subject of this appeal. The amount of such credits was arrived at as follows:

"In making the aforesaid assessment, appellee determined that notes and accounts receivable in the amount of $5,250,525 owned by appellant and its subsidiaries on tax-listing day in 1942 had arisen out of business transacted by appellant in Ohio inasmuch as such notes and accounts receivable resulted from the sale of products shipped from appellant's Ohio manufacturing plants; that $225,328 in prepaid insurance had arisen out of business transacted in

Ohio inasmuch as it represented prepaid premiums for insurance on appellant's Ohio manufacturing plants. The total of the credits so determined to have arisen out of business transacted by appellant in Ohio was $5,475,853 and was 47.623% of all of appellant's and its subsidiaries' notes, accounts receivable and prepaid items which amounted to $11,498,424 on tax-listing day in 1942. Appellee then computed said assessment by deducting $7,102,540, the total of appellant's and its subsidiaries' accounts payable, from $11,498,424, the total of the notes and accounts receivable and prepaid items, and assessing 47.623% of the remainder, to-wit, $2,093,450, as credits taxable in Ohio."

One question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto, as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

"Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a nonresident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-withdrawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation;"

It is clear that under this statute intangibles owned by a nonresident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

"Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. Ransom & Randolph Co. *v.* Evatt, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2d) 738; Haverfield Company *v.* Evatt, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.

We come now to section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

"Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:

"In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. * * *"

Said section also provides that:

"The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances."

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would

have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. Hillsborough Township *v.* Cromwell, 90 L. Ed. 298; Schwartz *v.* Essex County Board of Taxation, 129 N. J. L. 129, affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of National Cash Register Company *v.* Evatt, 145 O. S. 597, 31 O.O. 218, 42 O. L. A. 545, 15 O. Supp. 144, 62 N. E. (2d) 327, the Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by shipment from its manufacturing plant in Ohio, were taxable in this State. The Court said:

"We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation."

In referring to section 5328-2, General Code, the Court said:

"Applying that section to the facts in the instant case, it means that accounts receivable belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or *from a stock of goods maintained in Ohio*, shall be considered to arise out of business transacted in Ohio."

It is to be noted that a considerable portion of the products, the sales of which resulted in the accounts receivable in question, was manufactured after the orders thereof were accepted. However, no stress has been put by the appellant on whether these products so sold were shipped from a stock of goods maintained in Ohio since it is its claim that

none of its accounts receivable is taxable here. The Board is of the opinion that it makes no difference whether the products were put into their completed forms before or after the orders therefor were accepted. The appellant certainly maintained in Ohio a stock of goods which was necessary to make the completed products. The same question arose in the case of National Distillers Products Corporation *v.* Glander, No. 11118, decided by this Board on March 12, 1947. In that case approximately 90% of the whiskey shipped in cases from appellant's plant at Carthage, Ohio, was blended, rectified or bottled only upon receipt of shipping orders, and the Board held that the sales thereof were made from a stock of goods maintained in Ohio. Reference is hereby made to the entry in that case and also to the entry on the appeal of the same company with reference to a franchise tax assessment decided on the same date and bearing No. 9095.

For the foregong reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio and, therefore, arose out of business transacted in this State and, consequently, are taxable here.

No argument is made in any of the briefs with reference to the prepaid items, which consisted of prepaid insurance premiums on propgrty located in this State. As to this, section 5328-2, General Code, provides that prepaid items when used in business shall be considered to arise out of business transacted in a state other than the residence of the owner when the right acquired thereby relates exclusively to the business to be transacted in such other state or to property used in such business. The Board finds that these prepaid items relate to property used in appellant's business in this State and, in view of the above statutory provisions, arose out of business transacted in this State and are, therefore, taxable.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the De-

partment of Taxation, this day taken with respect to the above matter.

(S.) EDWARD J. KIRWIN,
*Secretary.*

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## APPENDIX C

SUPREME COURT OF OHIO

No. 31079

WHEELING STEEL CORPORATION, Appellant,

vs.

C. EMORY GLANDER, TAX COMMISSIONER OF OHIO, Appellee.

Certificate

On motion of appellant, Wheeling Steel Corporation, the Court orders it to be certified and made a part of the record of the proceedings and of the judgment of affirmance in this cause that in its Notice of Appeal to this Court from the Board of Tax Appeals, appellant drew in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio upon the ground that, as construed and applied by the Tax Commissioner and the Board of Tax Appeals of Ohio, said statutes are unconstitutional in this, that they burden and obstruct interstate commerce and unlawfully discriminate against appellant in violation of Article I, Section 8 of the Constitution of the United States, and deprive appellant of its property without due process of law, and deny appellant equal protection of the laws of the state of Ohio, contrary to the Fourteenth Amendment to the Constitution of the United States; and that the question of the validity of said statutes, as specified in said notice of appeal, was urged upon the Court in the briefs and arguments of counsel for appellant; that a determination of the question was necessary to the decision of this case; and further, that upon consideration of the same, the Court was of the opinion, and so decided,

that said statutes are valid and are not repugnant to the Constitution of the United States.

Witness the Honorable the Supreme Court of Ohio this 1 day of November, 1948.

SUPREME COURT OF OHIO,
CARL V. WEYGANDT,
*Chief Justice of the Supreme Court of Ohio.*

(9827)